

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE HON. J. CEDRIC SIMPSON,

Sup Ct #150404
JTC Formal Complaint #96

Respondent.

RESPONDENT'S REPLY BRIEF

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RESPONDENT'S REPLY BRIEF

ARGUMENT

The Examiner's Brief is replete with misstatements and mis-characterizations of the record and applicable law. This Reply Brief responds to those misstatements and mis-characterizations not already fully addressed in Respondent's initial brief.

I.

THE EVIDENCE PRESENTED DID NOT ESTABLISH THAT JUDGE SIMPSON INTERFERED WITH A POLICE INVESTIGATION, INTERFERED WITH A CRIMINAL PROSECUTION OR MADE ANY MISSTATEMENTS IN CONNECTION WITH THIS MATTER, AND THE COMMISSION ERRED IN FINDING THAT JUDGE SIMPSON ENGAGED IN ANY JUDICIAL MISCONDUCT, PARTICULARLY MISCONDUCT IN OFFICE.

A. Count I - Allegation of Interfering with Police Investigation. The best, clearest evidence of what occurred and did not occur at the scene of Ms. Vargas' arrest is the video taken at the scene. The video demonstrates clearly that Judge Simpson did not in any way at any time directly or indirectly interfere with Officer Cole's investigation or attempt to do so. Moreover, contrary to the Examiner's arguments:

- Judge Simpson's concern that Ms. Vargas might have been harmed by her ex-boyfriend was entirely reasonable considering what he knew about the history of emotional abuse in that relationship (V-82). The fact that Judge Simpson did not ask about Mr. Foglia at the scene, while the officer was investigating, is no indication that Judge Simpson wasn't concerned about whether Mr. Foglia had caused Ms. Vargas' emotional state that night. It is, instead, an indication of his non-interference with the investigation; and
- Contrary to the Examiner's argument, Judge Simpson's comments to Ms. Vargas

while she was seated in the back of the patrol vehicle did not “clearly demonstrate that Respondent’s actions were motivated not by a concern for her safety from an abusive ex-boyfriend but by his desire to get her out of trouble” (Examiner’s Brief, p 19). To the contrary, when Judge Simpson stated to Ms. Vargas that her law career was not over and that he was there to help her, he was understandably trying to console her at a time when she was justifiably concerned about her future. As this Court well knows, many individuals applying for admission to the Bar are admitted despite one or even several prior alcohol-related incidents. Judge Simpson was merely trying to convey this message to Ms. Vargas at a time and in a manner that did not interfere with the officer’s investigation.

B. Count II - Allegation of Interfering with the Prosecution

- Contrary to the Examiner’s argument, the fact that Judge Simpson permitted Ms. Vargas to continue her work as an intern is not “clear proof that Vargas was far more than a former student or an employee and that Respondent’s motives were not to protect the ‘integrity of the court,’ . . . but to influence Lillich’s prosecutorial decision” (Examiner’s Brief, p 22). As discussed in Respondent’s initial brief, Judge Simpson contacted Mr. Lillich because he questioned whether Ms. Vargas was being truthful with him about her PBT and DataMaster results because of the discrepancy between the two (137-41). After Judge Simpson determined that Ms. Vargas had, in fact, been truthful about both test results, he chose to continue her position as an intern in his court. Allowing her to remain, despite her OWI arrest upon concluding that she had been candid with him in admitting her misconduct was not even remotely an indication of special treatment;

- Judge Simpson’s discussion with Mr. Lillich of possible defense attorneys to

recommend to Ms. Vargas was in no way inappropriate and does not in any way warrant the conclusion that Judge Simpson “was personally involved in the decision of who would be representing Vargas” (Examiners’s Brief, p 24). This is especially so given that Ms. Vargas testified clearly that she alone was responsible for deciding whom to retain and for doing so (V-63);

- The fact that Mr. Lillich considered Judge Simpson a “social friend” is no evidence whatever of misconduct. As is necessarily the case in a community where many lawyers and judges have known and worked with each other for many years, Mr. Lillich’s social relationship with someone else does not make any difference in how he handles cases, as he so testified (333). Moreover, it is worth reiterating that Judge Simpson did not in any way attempt directly or indirectly to influence Mr. Lillich’s decision-making and that Judge Simpson did not delay the processing of Ms. Vargas’ matter. As Mr. Lillich testified:

Q: . . . in neither of the conversations or in any communication Judge Simpson had with you, with respect to Ms. Vargas, it’s correct, is it not, that he did not attempt to use his status as a judge to get you to do or not do anything that you were otherwise going to do?

A: No, I don’t think he did anything like that.

Q: Was there a wink and a nod involved?

A: No. No, there wasn’t a wink or a nod involved.

(335).

Q: With respect to the different communications that you had with Judge Simpson in September of 2013, did either one of these delay the processing of the case?

A: No. I wouldn’t call that period of time a delay, really.

(336); and

- The Examiner also seriously mis-characterizes Mr. Lillich’s testimony as to how he exercises discretion; Mr. Lillich tries to “make his practice as similar to what the Washtenaw County Prosecutor’s Office does as possible and practical, but . . . [he] also [has] a little bit more discretion to go ahead and make decisions in the right cases” (334).

C. Count III - Allegation of Misrepresentations

- The Examiner also overlooks the relevant time sequence in arguing that there is anything significant about Mr. Clark’s testimony that when he approached Ms. Vargas’s vehicle he did not see or hear Ms. Vargas “screaming, crying, frantic or speaking or yelling in Spanish” (180). She was in shock after the accident (V-36-37, 74), and the video at the scene shows clearly that her emotional state varied widely from moment to moment. In this circumstance, her emotional state when Mr. Clark approached her vehicle is no indication of her behavior or emotional state when she was on the phone with Judge Simpson (180). Mr. Clark, in fact, conceded that Ms. Vargas was already on the phone when he approached her vehicle, he did not know how long she had been on the phone, and he “wouldn’t know if she . . . blew her stack right after the impact” (181-82). In addition, the scout car video does not capture Ms. Vargas’ reaction immediately after impact;

- Well before Judge Simpson received the voluminous *Nassif* text messages on September 12, 2013, Ms. Vargas was conducting research for him on other preliminary issues related to the case. As also noted in Respondent’s initial brief, the Formal Complaint does *not* allege misconduct regarding communications between Judge Simpson and Ms. Vargas prior to August 1, 2013 (see ¶65). If the Formal Complaint had alleged misconduct

regarding the judge's communications with Ms. Vargas in July, the defense before the Master would have produced not just the evidence produced at trial but also further detailed evidence of Judge Simpson's communications with Ms. Vargas and other students regarding class responsibilities in July and the work Ms. Vargas began performing regarding Nassif long before Judge Simpson received the text message records to be reviewed;

- The Examiner also seriously mis-characterizes Judge Simpson's statements regarding his contacts with Ms. Vargas when he argues that Judge Simpson "claims that his contacts with Vargas were limited to group settings" (Examiner's Brief, p 26). The record is clear that Judge Simpson was quite candid about his various contacts with Ms. Vargas, as detailed in his initial brief and that the statement asserted by the Examiner is taken entirely out of context. Specifically, in his September 11, 2014, response to the request for investigation, Judge Simpson stated that he "did *not* at any time have social contact with Ms. Vargas other than in group settings including other students and/or court staff; his contacts with Ms. Vargas at such gatherings was no different from his contact with other students." Judge Simpson never stated that he didn't have individual contact with Ms. Vargas; he never had *social* contact with her other than in group settings; he obviously and admittedly had work contact with her individually; and

- There is nothing whatever in the record of this case that remotely contradicts Judge Simpson's testimony that he had observed bruises on the back of Ms. Vargas' leg and neck, regardless of whether or not she was ever physically abused by her ex-boyfriend.

For all of these reasons, the record fails entirely to establish that Judge Simpson interfered with the police investigation, interfered with Mr. Lillich's investigation or misrepresented either his

relationship with Ms. Vargas or the purpose or purposes of text messages and telephone calls between them.

II.

EVEN IF THE EVIDENCE COULD ARGUABLY BE VIEWED AS WARRANTING A FINDING THAT JUDGE SIMPSON VIOLATED MCJC CANON 2(A), APPLICATION OF THE STANDARDS SET OUT IN *IN RE BROWN*, 461 MICH 1291 (2000), TO THE TOTALITY OF THE CIRCUMSTANCES OF THIS MATTER DOES NOT WARRANT EITHER REMOVAL FROM OFFICE OR A SUBSTANTIAL SUSPENSION.

The Examiner's argument as to the appropriate level of discipline – in the event this Court reaches that question – is notable, and telling, in what it fails to address:

- The Examiner's Brief fails entirely to respond to Respondent's and the Master's position as to why the evidence was insufficient to establish the charge of misconduct in office;
- The Examiner's Brief fails entirely to respond to Respondent's analysis of this Court's decisions in *In re Brown*, 464 Mich 135, 137 (2001), *In re Morrow*, 496 Mich 291 (2014), *In re Logan*, 486 Mich 1050 (2010), *In re Servaas*, 484 Mich 634 (2009), or *In re Hultgren*, [unpublished] (2008) (Docket #136880), all of which refute the Examiner's argument that an appropriate sanction here would be removal from office;
- The Examiner's Brief incorrectly asserts that Judge Simpson is not remorseful for his conduct. In fact, the record demonstrates that throughout Judge Simpson is remorseful for his conduct, that he has reflected carefully on his decisions and actions and that, if he faced a similar situation in the future, he would choose to respond quite differently. Judge Simpson understands that while a judge's mere presence at a scene is not misconduct, it can

raise questions, as his presence at the scene of Ms. Vargas' arrest obviously has done. For this reason – even though questions are not the same as misconduct – if a situation like this were to arise again, he would not personally go to the scene. He would avoid appearing at the scene not because he misused or attempted to misuse his office on this occasion but in order to avoid even a question as to the propriety of his conduct (230-33). Moreover, even though he did not interfere or attempt to interfere with either Ms. Vargas' arrest or her prosecution, Judge Simpson has an appropriate attitude toward and commitment to his obligations as a judicial officer. He recognizes that it would have been more prudent not to appear at the scene and not to call Mr. Lillich, a point he made in both his answer to the request for comments and his testimony (230-32). As he stated in his answer to the request for comments, if such a situation were to arise again, "the circumstances of the underlying matter could be viewed by some as raising questions as to the propriety of his involvement in the matter. He also understands and accepts that prudence and proper respect for the appearance of impropriety aspirational standard dictate that he refrain from future conduct that could even raise a question as to the propriety of his conduct (Exhibit 2, April 18, 2014, Answer to Request for Comments);

- The Examiner's Brief also overlooks the fact that, throughout the investigation and litigation of this matter, Judge Simpson has been entirely candid and cooperative. The record thoroughly establishes that, at every stage, Respondent responded truthfully and in detail to all questions posed by the Examiner and documented those responses appropriately. While the Examiner disagrees with many statements made by Respondent, the Examiner repeatedly but wrongly equates disagreement with falsity and, even as to any arguably erroneous

statement, wrongly assumes that any misstatement is a knowing lie; and

- The Examiner's Brief also overlooks Respondent's fine reputation and absence of any prior disciplinary history – highly significant factors the relevant facts as to which are detailed in Respondent's initial Brief at pp 2-4.¹

Finally, the Examiner is also far off-base in arguing that the level of publicity this case has received – a claim that is notably not a part of the evidentiary record – is relevant to the sanction determination. The fallacy of the Examiner's argument should be self-evident: Allowing the level of publicity any particular case receives to affect the sanction determination would, in significant part, effectively delegate the sanction decision to those who decide whether or not to publicize a given matter.

For all of these reasons and for all the reasons detailed in Respondent's initial brief, even if there were some misconduct in this matter, the sanction to be imposed should not be one that involves suspending Judge Simpson from carrying out of his judicial responsibilities for any substantial length of time.

¹In discussing his position as to the appropriate level of discipline, the Examiner references three factors suggested by the American Judicature Society in "How Judicial Conduct Commissions Work," American Judicature Society (1999), pp 15-16 (Examiner's Brief, p 38), but fails to address Judge Simpson's reputation and absence of discipline history, also a factor recommended by the AJS and acknowledged as relevant by this Court in *In re Chrzanowski*, 465 Mich 468, 477 (2001) at n 11.

RELIEF REQUESTED

For all the reasons stated above, this Court should reject or, in the alternative, modify the Judicial Tenure Commission's recommendations as requested herein.

Respectfully submitted,

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Dated: December 8, 2015

CERTIFICATE OF OF SERVICE

Kenneth M. Mogill states that on the 8th day of December 2015, he served copies of the following:

Respondent's Reply Brief

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